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Picture Worth Ten Thousand Words: Non-Audio Surveillance Videotapes Now Statements under Section 287.215 of Missouri's Workers' Compensation Law, The

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Notes

The Picture Worth Ten Thousand Words: Non-Audio Surveillance Videotapes Now Statements Under Section 287.215 of Missouri's Workers' Compensation Law

Fisher v. Waste Management of Missouri[1]

I. INTRODUCTION

When Michael Fisher filed his workers' compensation claim, he was unaware that his employer, Waste Management of Missouri, had been secretly videotaping his physical activities.[2] Not surprisingly, the submission of the surveillance videotapes at Fisher's compensation hearing significantly contributed to the reduction of his disability ruling.[3] The admission of these surveillance videotapes is, subsequently, the focus of this Note.

Missouri law has long held that a non-auditory surveillance videotape was not a "statement" under Section 287.215 of its workers' compensation law.[4] As a result, non-disclosure of such videotapes did not bar their admissibility at a compensation hearing, until now.[5] Disregarding precedent of the Eastern District Court of Appeals,[6] the Missouri Supreme Court held in *Fisher v. Waste Management of Missouri*[7] that a non-auditory surveillance videotape is a "statement" under Section 287.215 of Missouri's workers' compensation law.[8] This Note will examine the meaning of a "statement" under Missouri's workers' compensation law and the process through which an employee can obtain such statements prior to a compensation hearing.[9] Functionally, *Fisher* now requires an employer to produce any surveillance videotapes it may possess if the tapes

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1. 58 S.W.3d 523 (Mo. 2001).
2. *See id.*
3. *See infra* notes 30-31 and accompanying text.
4. This standard began with the inception of Chapter 287 of Missouri's workers' compensation statute in 1959. *See* Erbschloe v. Gen. Motors Corp., 823 S.W.2d 117, 119 (Mo. Ct. App. 1992).
5. *Fisher*, 58 S.W.3d at 527.
6. *See Erbschloe*, 823 S.W.2d at 119.
7. 58 S.W.3d 523 (Mo. 2001).
8. *Fisher*, 58 S.W.3d at 527.
9. *See infra* Part III.

depict the employee, and the employee makes request to the employer to produce any statements.[10]

II. FACTS AND HOLDING

Michael Fisher hauled trash for Waste Management of Missouri ("Waste Management").[11] On June 18, 1997, and again on September 18, 1997, Fisher injured his right shoulder and arm while lifting heavy trash cans.[12] As a result of these injuries, Fisher filed a workers' compensation claim against his employer, Waste Management.[13] Shortly thereafter, and unknown to Fisher, Waste Management began to take non-auditory surveillance videotapes of Fisher's physical activities.[14] The surveillance videotapes at issue depicted Fisher performing activities incident to his employment without physical limitation.[15]

In preparation for his upcoming compensation hearing, Fisher's attorney requested Waste Management to disclose all "statements"[16] made by Fisher, pursuant to Missouri Revised Statutes Section 287.215.[17] Section 287.215[18] essentially requires an employer to disclose all statements upon proper request.[19] Waste Management, however, did not disclose the surveillance videotapes it possessed upon Fisher's request.[20]

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10. *Fisher*, 58 S.W.3d at 523.

11. *Id.* at 524.

12. Fisher v. Waste Mgmt. of Mo., No. ED 78091, 2001 WL 69249, at *1 (Mo. Ct. App. E.D. Jan. 30, 2001), *rev'd*, 58 S.W.3d 523 (Mo. 2001).

13. *Id.*

14. *See Fisher*, 58 S.W.3d at 524.

15. *Id.* (Limbaugh, C.J., dissenting).

16. *Fisher*, 2001 WL 69249, at *1. For several definitions of "statement," see *infra* note 92 and accompanying text.

17. *Id.* The court recognized two possible methods for discovering the videotapes under Missouri's workers' compensation laws. *Id.* at **3-4. The first method, authorized by Section 287.560, is to depose the employer and use a subpoena duces tecum to compel the production of evidence, similar to that of a civil proceeding. *Id.* at *3. The second method, utilized in the instant case, is to request all "statements" as authorized by Section 287.215. *Id.* at *4. For further discussion on Section 287.215, *see infra* Part III(A).

18. For text of Missouri Revised Statutes Section 287.215, *see infra* note 46 and accompanying text.

19. MO. REV. STAT. § 287.215 (2000).

20. *See Fisher*, 2001 WL 69249, at *1

At Fisher's compensation hearing, two physicians testified by deposition about the extent of Fisher's injuries.[21] Their diagnoses varied greatly.[22] In addition to the medical testimony of these experts, Waste Management attempted to offer into evidence the non-auditory surveillance videotapes of Fisher.[23] The administrate law judge ("ALJ") excluded the surveillance videotapes, holding that the videotapes qualified as "statements" under Section 287.215.[24] The videotapes, therefore, should have been disclosed pursuant to Fisher's discovery request.[25] The ALJ went on to conclude that Fisher sustained a "[thirty] percent permanent partial disability" to his shoulder.[26]

The Labor and Industrial Relations Commission, however, overruled the ALJ's exclusion of the surveillance videotapes.[27] The Commission held that the videotapes were not statements under Section 287.215[28] and admitted three videotapes into evidence.[29] Relying "primarily"[30] on these videotapes, the Commission reduced Fisher's disability award from thirty to ten percent.[31]

On appeal to the Missouri Court of Appeals for the Eastern District, Fisher contended that the surveillance videotapes were "statements" within the meaning of Section 287.215.[32] Therefore, Fisher argued, the videotapes should have been excluded from the Commission's review because Waste Management failed to produce the videotapes upon request.[33] Fisher further alleged that the definition of "statement" contained in Missouri Rule of Civil Procedure 56.01(b)(3)[34]

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21. *Fisher*, 58 S.W.3d at 524. Specifically, the first physician, Dr. J.H. Morrow, testified that Fisher sustained a forty-five percent "permanent partial disability to the right shoulder." *Fisher*, 2001 WL 69249, at *1. The second, Dr. Michael P. Nogalski, Fisher's treating physician, testified that Fisher sustained a three percent disability. *Id.* Upon a third, and final diagnosis on July 29, 1998, Dr. Nogalski diagnosed Fisher with "mild chronic rotator cuff tendonitis." *Id.*

22. *See supra* note 21 and accompanying text.

23. *Fisher*, 58 S.W.3d at 524.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Fisher v. Waste Mgmt. of Mo., No. ED 78091, 2001 WL 69249, at *1 (Mo. Ct. App. E.D. Jan. 30, 2001), *rev'd*, 58 S.W.3d 523 (Mo. 2001).

29. *Id.*

30. *Fisher*, 58 S.W.3d at 524.

31. *Id.*

32. *Fisher*, 2001 WL 69249, at *2.

33. *Id.*

34. MO. R. CIV. P. 56.01(b)(3) provides, in part:

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. For purpose of this paragraph, *a statement previously made is*: (a) a written statement signed or

should apply to Section 287.215.[35] Rejecting these arguments, the Eastern District affirmed the Commission's ruling and held that the surveillance videotapes were not statements as the term is used under the workers' compensation statute.[36] Fisher subsequently appealed to the Missouri Supreme Court.[37]

The Missouri Supreme Court granted transfer, limiting its consideration to the "question of law relating to [the] admissibility of the [surveillance] videotapes"[38] under the meaning of "statement" in Section 287.215.[39] Utilizing a "pragmatic" approach,[40] the Missouri Supreme Court reversed the ruling of the Eastern District.[41] In so doing, the court held that a non-audio surveillance videotape constitutes a "statement" within Section 287.215.[42] Such a holding, the court noted, "fits the legislative purpose . . . under chapter 287 . . . to give employees expeditious and simple means of compensation."[43] Consequently, the court held that a surveillance videotape that is not disclosed upon an employee's request for a "statement" under Section 287.215 is inadmissible at any hearing.[44]

III. LEGAL BACKGROUND

There are now two mechanisms for discovering a surveillance videotape under Missouri's workers' compensation laws: Missouri Revised Statutes

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otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, audio, *video, motion picture or other recording*, or a transcription thereof, of the party or *of a statement made by the party* and contemporaneously recorded.

MO. R. CIV. P. 56.01(b)(3) (2002) (emphasis added).

The Missouri Supreme Court has noted that Rule 56.01's definition of statement is a product of its "effort to accommodate the General Assembly's enactment of S.B. 127 in 1989." State *ex rel.* Mo. Pac. R.R. v. Koehr, 853 S.W.2d 925, 926 (Mo. 1993).

35. *Fisher*, 2001 WL 69249, at *4.

36. *Id.*

37. Fisher v. Waste Mgmt. of Mo., 58 S.W.3d 523, 524 (Mo. 2001).

38. *Id.*

39. *Id.*

40. *Id.* at 525. While the court noted that, "pragmatism . . . [did] not wholly govern [its] decision," the court's holding, as discussed *infra* Part V, suggests otherwise. *Id.* at 525.

41. *Id.* at 525-27.

42. *Id.* at 527.

43. *Id.*

44. *See id.*

Sections 287.215 and 287.560.[45] The following will describe these two methods, and the precedent elaborating the definition of a "statement" under each.

A. Section 287.215

The first method is to request all "statements" as authorized by Section 287.215.[46] That section provides, in part, "no *statement* in writing made or given by an injured employee . . . shall be admissible in evidence, used or referred to in any manner at any hearing or action . . . unless a copy thereof is given or furnished [to] the employee."[47] As is evident by the statutory language, if a party does not disclose all statements upon proper request, those statements are inadmissible as evidence in any hearing.[48] Section 287.215 does not, however, provide an internal definition of what qualifies as a statement.[49] Nor does this section indicate whether a surveillance videotape constitutes a statement, thereby requiring its disclosure upon request.[50] This issue was first encountered thirty-three years after the adoption of Chapter 287 by the Eastern District of the Missouri Court of Appeals.[51]

In 1992, the Missouri Court of Appeals for the Eastern District held that non-auditory surveillance videotapes were *not* statements under Section 287.215 of Missouri's workers' compensation law.[52] Indeed, the court held that Section 287.215 "clearly addresses *only* statements."[53] In *Erbschloe v. General Motors*, an employee filed a workers' compensation claim alleging that he sustained an

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45. *Fisher*, 58 S.W.3d at 525.

46. *Fisher*, 58 S.W.3d at 525. Missouri Revised Statues Section 287.215 states:

> No *statement* in writing made or given by an injured employee, whether taken and transcribed by a stenographer, signed or unsigned by the injured employee, or any statement which is mechanically or electronically recorded, or taken in writing by another person, or otherwise preserved, *shall be admissible in evidence*, used or referred to in any manner at any hearing or action to recover benefits under this law *unless a copy thereof is given or furnished the employee*, or his dependents in case of death, or their attorney, within fifteen days after written request for it by the injured employee, his dependents in case of death, or by their attorney.

MO. REV. STAT. § 287.215 (2000) (emphasis added).

47. *Id.* (emphasis added).

48. *Id.* Specifically, Section 287.215 states that an employer must furnish a copy of the statement "within fifteen days after written request" by an injured employee. *Id.*

49. *See id.*

50. *Fisher*, 58 S.W.3d at 525.

51. *See* Erbschloe v. Gen. Motors, 823 S.W.2d 117 (Mo. Ct. App. 1992).

52. *Id.* at 119 (emphasis added).

53. *Id.* (emphasis added). This ruling closely mirrors the facts of *Fisher*.

injury while lifting an object at work.[54] Prior to the compensation hearing, the employee requested that his employer disclose all statements pursuant to Section 287.215.[55] At the hearing, over the employee's objection, the employer introduced non-auditory surveillance videotapes of the employee.[56] Based partially on the videotapes, the ALJ found the employee's testimony "incredible."[57] In allowing the admission of the videotapes, the ALJ ruled that the videotapes were not a "statement" under Section 287.215.[58] Consequently, the ALJ denied the employee compensation.[59] This ruling was then upheld by the Labor and Industrial Relations Commission, affirmed by the circuit court, and confirmed by the Eastern District.[60]

In reaching its decision, the *Erbschloe* court found *no authority* supporting the employee's contention that a videotape is a statement within the meaning of Section 287.215.[61] Consequently, the court held that non-auditory surveillance videotapes are not "statements" under Section 287.215.[62] As a result, prior to the holding in *Fisher*, an employee's request of a "statement" pursuant to Section 287.215 did not obligate the employer to produce a surveillance videotape.[63] Still, even under this holding, employees seeking to discover whether their employer had made surveillance videotapes were not without recourse.[64] Discovery of a non-auditory surveillance videotape is possible under Missouri Revised Statutes Section 287.560.[65]

B. Section 287.560

The second discovery mechanism available under Missouri's workers' compensation law is a deposition and subpoena duces tecum,[66] as authorized by Section 287.560.[67] While Section 287.560, like Section 287.215, does not

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54. *Id.* at 118.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 118-19.
61. *Id.* at 119.
62. *Id.*
63. *See id.*
64. *See infra* notes 66-81 and accompanying text.
65. *See infra* note 67 and accompanying text.
66. A subpoena duces tecum is defined as "[a] subpoena ordering the witness to appear and to bring specified documents or records." BLACK'S LAW DICTIONARY 1440 (7th ed. 1999).
67. Fisher v. Waste Mgmt. of Mo., 58 S.W.3d 523, 525 (Mo. 2001). Section

provide an internal definition of "statement," a precise definition does exist.[68] To provide a definition of "statement," the Missouri Supreme Court in *McConaha v. Allen*[69] incorporated the definition of statement from Missouri Rule of Civil Procedure 56.01[70] into the permissible scope of discovery available under Section 287.560.[71] Rule 56.01 specifically provides that a statement includes surveillance videotapes.[72] The *McConaha* court's reasoning for integrating this definition is based wholly on the language of Section 287.560.[73] The language of this section of the workers' compensation law specifically authorizes a party to use a deposition in workers' compensation hearings "in like manner" to those in a civil case.[74] Since Rule 56.01 specifies the general scope of discovery in matters of civil procedure, the court reasoned that the rule also controls what is discoverable under Section 287.560.[75] Consequently, a surveillance videotape may be discovered by using a subpoena duces tecum during a Section 287.560 deposition.[76] This definition of "statement," however,

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287.560 authorizes a party to "compel the attendance of witnesses and the production of books and papers, and at his own cost to take and use depositions in like manner as in civil cases in the circuit court." Mo. Rev. Stat. § 287.560 (2000).

68. *See* State *ex rel.* Mo. Pac. R.R. v. Koehr, 853 S.W.2d 925, 926-27 (Mo. 1993).

69. 979 S.W.2d 188 (Mo. 1998).

70. For the definition of "statement" under Rule 56.01(b)(3), *see supra* note 34. In *Koehr*, the court noted that a "statement" as defined by Rule 56.01 is at "variance with the standard dictionary definition." *Koehr*, 853 S.W.2d at 926. As such, a contrary internal definition will supersede the commonly accepted dictionary definition of a term. *Id.* (citing *In re* Estate of Hough, 457 S.W.2d 687, 691 (Mo. 1970)). For an interesting analysis of Rule 56.01 and Missouri's treatment of surveillance evidence *see* Kenneth E. Siemens, *The Discoverablity of Personal Injury Surveillance and Missouri's Work Product Doctrine*, 57 MO. L. REV. 871 (1992).

71. *McConaha*, 979 S.W.2d at 189. The *McConaha* court specifically held that Section 287.560 authorizes the use of a subpoena duces tecum under Rule 57.09(b). *Id.*; *see also* MO. REV. STAT. § 287.560 (2000).

72. *Koehr*, 853 S.W.2d at 926-27; *see also* Giddens v. Kansas City S. Ry., 29 S.W.3d 813, 819 (Mo. 2000).

73. *See McConaha*, 979 S.W.2d at 189-90; *see also* MO. REV. STAT. § 287.560 (2000).

74. *See McConaha*, 979 S.W.2d at 188 (citing MO. REV. STAT. § 287.560). Missouri Rule of Civil Procedure 57.09(b) governs the use of a subpoena for taking depositions in civil cases. Rule 57.09(b) provides, that "[a] subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein." MO. R. CIV. P. 57.09(b).

75. *McConaha*, 979 S.W.2d at 189.

76. Fisher v. Waste Mgmt. of Mo., 58 S.W.3d 523, 525 (Mo. 2001) (citing *McConaha*, 979 S.W.2d at 188 (articulating that surveillance videotapes are discoverable through a subpoena duces tecum in a workers' compensation hearing because of Section 287.560's specific reference to civil depositions under Rule 56.01)).

is subject to one important limitation.[77] The *McConaha* court expressly limited this definition of a "statement" to supplement *only* Section 287.560, and no other statute.[78]

Based on the *McConaha* holding, it is clear that an employer is obligated to disclose a surveillance videotape when an employee issues a subpoena requesting the production of any statements during a deposition proceeding.[79] By the terms of *McConaha*, however, this interpretation of "statement" was not incorporated into the request procedure under Section 287.215.[80] As a result of these two discovery mechanisms and interpretive case law, in a workers' compensation claim, surveillance videotapes were discoverable under a request for a statement only through the deposition process of Section 287.560 but not through a written request under Section 287.215.[81]

IV. INSTANT DECISION

A. The Majority

In *Fisher*, the Missouri Supreme Court considered whether a non-auditory surveillance videotape constitutes a "statement" under Section 287.215 of Missouri's workers' compensation law.[82] After briefly revisiting the facts of the case, the majority began its analysis by expressing, for "consistency," a "desirable" meaning of the word "statement" as it is used in both Sections 287.215 and 287.560.[83] Recognizing that "pragmatism, consistency and

77. *See infra* note 78 and accompanying text.

78. *See McConaha*, 979 S.W.2d at 189 (holding that Rule 56.01 is applicable only to Section 287.560 because the statute requires depositions to be taken "in the same manner as civil depositions").

79. *Id.*

80. *See id.* at 189.

81. *See supra* notes 45-80 and accompanying text.

82. Fisher v. Waste Mgmt. of Mo., 58 S.W.3d 523 (Mo. 2001).

83. *Id.* at 525. For a discussion of the methods of discovery, *see supra* Part III. The court also discussed the legislatively enacted definition of "statement" in 1989. *Fischer*, 58 S.W.3d at 525. The court found, however, that without specific reference, this definition does not change or modify Section 287.215. *Id.* The court also noted that "MO. CONST. [art.] III, [§] 28 prohibits the general assembly from amending statutes without setting forth in full the statutes so amended." *Id.* at 525 n.3 (citing Sours v. State, 603 S.W.2d 592, 599 (Mo. 1980)).

convenience do not wholly govern"[84] its decision, the court began stating that its holding was "entirely dependent upon the words of the statute."[85]

Attempting to discern the meaning of Section 287.215, the court examined both the legislative intent and purpose of the workers' compensation statute.[86] The court began by analyzing the legislative intent of Section 287.215.[87] The court noted that, in Missouri, while legislative intent is "derived from the statute's words 'used in their plain and ordinary meaning,'"[88] it must also consider the statute's "over-all scheme"[89] as established by the legislature.[90] Although the original enactment of Section 287.215 did not define the word "statement," the court found its language "indicated a broad meaning."[91] The court turned to the 1950 edition of Webster's Second International Dictionary, which defines "statement" as the "[a]ct of stating, reciting, or presenting, orally or on paper; as, the *statement* of a case . . . an embodiment in words of facts or opinions; a . . . report."[92] Focusing on this definition, the court found that Waste Management's surveillance videotapes were "certainly a 'report' on [Fisher's] physical condition."[93] Finding that "there is no question that information is conveyed in this report,"[94] the court next examined whether Fisher in fact made

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84. *Fisher*, 58 S.W.3d at 525. The majority stated that "the pragmatic choice . . . is bolstered by the fact that a request for a statement under section 287.215 is far easier and less expensive than using the deposition and *subpoena* procedure of section 287.590." *Id.*

85. *Id.* at 524-25.

86. *Id.* at 526-27.

87. *Id.* at 526.

88. *Id.* (quoting Budding v. SSM Healthcare Sys., 19 S.W.3d 678, 680 (Mo. 2000)).

89. *Fisher*, 58 S.W.3d at 526.

90. *Id.* The majority found that changes in the original version of Section 287.215 in 1965 and 1973 expanded the statute to incorporate "technology unknown in 1959, such as videotape, and is broadened to include 'any statement . . . mechanically or electrically recorded . . . or otherwise preserved.'" *Id.* at 526 n.4. For a discussion of this statute's construction see *infra* Part V.

91. *Fisher*, 58 S.W.3d at 526.

92. *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2461 (2d ed. 1950)) (internal quotation marks omitted). The court found unhelpful WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1st ed. 1961 to 3d ed. 1993), which defined a "statement" as "the act or process of stating, reciting, or presenting orally or on paper . . . 2. something stated: a: as a report or narrative . . . b: a single declaration or remark." *Id.* at 526 n.5 (internal quotation marks omitted). A "statement" is also defined as "[a] verbal assertion or nonverbal conduct intended as an assertion." BLACK'S LAW DICTIONARY 1416 (7th ed. 1999).

93. *Fisher*, 58 S.W.3d at 526.

94. *Id.*

a report through Waste Management's surveillance videotapes.[95] Had Fisher in fact made a report through Waste Management's surveillance videotapes, such conduct would qualify as a statement under the court's reading of the Webster's definition.[96]

Although Fisher did not "knowingly or voluntarily"[97] participate in the videotape surveillance, the majority found that Fisher's recorded conduct "gave information."[98] Furthermore, the court noted that neither the dictionary definition,[99] nor Section 287.215, is so limited as to exclude involuntary reports or statements.[100] Moreover, the court observed that a statement in writing covers "any statement which is mechanically or electronically recorded, or taken as a writing by another person, or otherwise preserved."[101] This language, the court stated, "clearly cover[s] a statement . . . made without [Fisher's] knowledge."[102] Consequently, the court held that because Fisher's "conduct, as recorded on the videotape, gave information,"[103] the surveillance videotapes were a report.[104] As such, the court concluded that Fisher's report—his conduct captured on the surveillance videotapes—was a statement under Section 287.215, citing the Chinese proverb that pictures "are worth more than 10,000 words."[105]

Following its analysis of the legislative intent of Section 287.215, the court next examined the legislative purpose with respect to a "statement" within the entirety of the statutory scheme.[106] The court found that including videotape surveillance within the meaning of "statement," "fits the legislative purpose as discerned from the statutory scheme as a whole."[107] The court stated that the purpose of the workers' compensation proceeding is to provide "expeditious and simple means of compensation."[108] Because discovery relies chiefly on injury and physician reports, the court further found that the statute is designed to provide for an "easy and informal exchange of information and the settlement

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95. *Id.*

96. *See id.*

97. *Id.*

98. *Id.* at 527.

99. *Id.* at 526; *see supra* text accompanying note 92.

100. *Fisher*, 58 S.W.3d at 526.

101. *Id.* at 527.

102. *Id.*

103. *Id.*

104. *See id.*

105. *Id.* (citing State *ex rel.* Mo. Pac. R.R. Co. v. Koehr, 853 S.W.2d 925, 925 (Mo. 1993)).

106. *Fisher*, 58 S.W.3d at 527.

107. *Id.*

108. *Id.* (citing Saint Lawrence v. Trans World Airlines, Inc., 8 S.W.3d 143, 149 (Mo. Ct. App. 1999)).

of most claims."[109] Holding that a videotape is not a "statement," the court noted, would be "inconsistent" with the statute's general purpose.[110] To do so would allow an employer to withhold a surveillance videotape, encourage hearings, and discourage settlement.[111]

B. The Dissent

In his dissent, Chief Justice Limbaugh began by stating that the "dictionary definition of 'statement' cannot be stretched to accommodate the majority's policy preference that [a statement] should [mean] the same" thing under Section 287.215 as it does under Section 287.560.[112] Recognizing that although the majority correctly stated Missouri's rule for deriving legislative intent, Chief Justice Limbaugh argued that the majority nonetheless "rewrites the statute."[113] Moreover, Chief Justice Limbaugh asserted that the majority "cavalierly tosses aside"[114] the court's analysis in *Koehr* that held that the dictionary definition of statement was "at variance"[115] with the definition in Rule 56.01 which expressly includes "video, motion picture or other recording . . . of the party."[116] Furthermore, Chief Justice Limbaugh stated that the majority "unhesitatingly"[117] reversed the Eastern District's holding that the term "statement" under Section 287.215 did not include non-auditory surveillance videotapes.[118]

After repeating the dictionary definitions of "statement" that were cited by the majority,[119] Chief Justice Limbaugh observed that a statement's "overriding theme" is "an affirmative act of communication in words, either oral or written."[120] As such, Chief Justice Limbaugh stated that Fisher in no way made

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 527-28 (Limbaugh, C.J., dissenting).

113. *Id.* at 528 (Limbaugh, C.J., dissenting). Missouri's rule regarding statutory interpretation is that legislative intent is "derived from the statute's words 'used in their plain and ordinary meaning.'" *Id.* (Limbaugh, C.J., dissenting) (citing Budding v. SSM Healthcare Sys., 19 S.W.3d 678, 680 (Mo. 2000)).

114. *Id.* (Limbaugh, C.J., dissenting).

115. *Id.* (Limbaugh, C.J., dissenting).

116. *Id.* (Limbaugh, C.J., dissenting). For the definition of "statement" under Rule 56.01, *see supra* note 34 and accompanying text.

117. *Fisher*, 58 S.W.3d at 528 (Limbaugh, C.J., dissenting).

118. *Id.* (Limbaugh, C.J., dissenting).

119. *Id.*; *see supra* text accompanying note 92.

120. *Fisher*, 58 S.W.3d at 528 (Limbaugh, C.J., dissenting); *see also Fisher*, No. ED 78091, 2001 WL 69249, at *4 (Mo. Ct. App. Jan. 30, 2001) (finding that under Rule 56.01 the definition of "statement," in the evidentiary context, includes an "assertion" or

"a 'statement' by being filmed surreptitiously while engaged in conduct that was neither intended as a communication,"[121] nor could be so construed.[122] Moreover, Chief Justice Limbaugh asserted that in order to characterize Fisher's conduct as a report, it must necessarily "be intended to report, and it must be a report in words."[123] Finally, Chief Justice Limbaugh stated that the "non-assertive, unspoken and unwritten conduct"[124] captured on Waste Management's surveillance videotape "is simply not a 'statement' in the 'plain and ordinary meaning' of the term."[125] Consequently, Chief Justice Limbaugh concluded that a non-auditory surveillance videotape is "not a 'statement' within the meaning of Section 287.215."[126]

V. COMMENT

In holding that a "statement" under Section 287.215 includes non-auditory surveillance videotapes, the majority of the Missouri Supreme Court indeed rewrote the statute.[127] The following will demonstrate that the court's interpretation of a "statement" was simply inconsistent with the statutory language and purpose of Section 287.215. The resulting conclusion agrees with the Eastern District's holding and Chief Justice Limbaugh's dissent, and concludes that a non-auditory surveillance videotape is not a statement within the meaning of Section 287.215.

A. The Construction and Scope of Section 287.215

As paramount to this Note, the language of Section 287.215 demands further examination. Section 287.215 provides:

> No statement in writing made or given by an injured employee, whether taken and transcribed by a stenographer . . . or any statement

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"conduct intended as an assertion," is more broad and inclusive than the ordinary dictionary meaning of statement used in Section 287.215); Erbschloe v. Gen. Motors, 823 S.W.2d 117, 119 (Mo. Ct. App. 1992) (Stephan, J., concurring) (stating that although a videotape may be nonverbal conduct, an employee who is unaware that his employer is videotaping his actions does not intend to assert those actions, and, therefore, an employee's non-assertive conduct cannot constitute a statement under Section 287.215).

121. *Fisher*, 58 S.W.3d at 528 (Limbaugh, C.J., dissenting).
122. *Id.* (Limbaugh, C.J., dissenting).
123. *Id.* (Limbaugh, C.J., dissenting).
124. *Id.* (Limbaugh, C.J., dissenting).
125. *Id.* (Limbaugh, C.J., dissenting).
126. *Id.* (Limbaugh, C.J., dissenting).
127. *See id.* (Limbaugh, C.J., dissenting).

> which is mechanically or electronically recorded . . . shall be admissible in evidence . . . unless a copy thereof is given or furnished [to] the employee.[128]

There is a common theme within this statute: Section 287.215 requires an affirmative *verbal* statement made or given by an employee. A verbal statement does not necessarily implicate oral or vocal communication. Rather, "verbal" relates to an expression of words.[129] Supporting this interpretation, the first phrase of Section 287.215 clearly provides for those statements—expressions of words—that have been reduced to written form. Indeed, this is evident from the statutory language that provides for methods of recording such verbal statements by reference to a stenographer. Furthermore, the second phrase of Section 287.215 implicates those statements—expressions of words—that have not been reduced to written form. Included are those statements that have been "mechanically or electronically recorded."[130] For example, an electronic recording includes a tape recording of an employee's statement of his or her physical condition. This phrase illustrates the process of affixing an employee's verbal statement to a tangible medium. Accordingly, Section 287.215 seemingly applies to verbal statements given or made by an employee, whether written or recorded by some other means.

As the court correctly recognized, absent an internal statutory definition, legislative intent is derived from the plain and ordinary meaning of a statutory term.[131] This is the meaning of the term presumed by the legislators at the enactment of the legislation.[132] Relying on the 1950 edition of Webster's Dictionary, the majority found that a statement is an "[a]ct of stating, reciting, or presenting, orally or on paper . . . [t]hat which is stated; an embodiment in words; . . . a . . . report."[133] Based on this definition, the plain and ordinary meaning of a statement sounds clear. A statement is a *verbal* expression of words conveying information, whether written, oral, or otherwise presented, regardless of form. Indeed, the majority's definition verifies the verbal nature of a "statement" by specifying a "reciting . . . orally or on paper," and that which is "an embodiment of words."[134] Accordingly, the definition upon which the

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128. MO. REV. STAT. § 287.215 (2000).

129. "Verbal" is defined as "[o]f, relating to, or expressed in words." BLACK'S LAW DICTIONARY 1554 (7th ed. 1999).

130. MO. REV. STAT. § 287.215 (2000).

131. *Fisher*, 58 S.W.3d at 526; *see also In re* Beyersdorfer, 59 S.W.3d 523, 525 (Mo. 2001); Maudlin v. Lang, 867 S.W.2d 514, 516 (Mo. 1993).

132. *Fisher*, 58 S.W.3d at 526.

133. *Id.* (internal quotation marks omitted).

134. *Id.*; *see supra* note 92 and accompanying text.

majority based its interpretation precludes the type of non-verbal conduct at issue in the instant case.

The court's reliance on Fisher's conduct as a "report"[135] is similarly flawed. According to the court's definition, a "report" necessarily implicates "that which is stated."[136] This implies that a report is a statement—a verbal expression of words. As previously noted, Fisher's non-verbal physical conduct was not a statement within the court's definition. Accordingly, reliance on Fisher's physical conduct as a report is inconsistent with the plain and ordinary meaning of statement because Fisher's conduct was not an expression in words; it was not a report, and, therefore, not a statement as defined by the court.

The plain and ordinary meaning of a "statement" is simply inconsistent with the majority's interpretation of the meaning of statement under Section 287.215. A statement is a verbal expression of words; the plain understanding of a "statement" cannot be so construed as to include a surreptitious surveillance videotape depicting Fisher's physical conduct. Such physical conduct captured on surveillance videotape is not a verbal statement because there are no expressed words. While the conduct may be later described in words, the actor is not "making or giving"[137] a statement. Indeed, there is no verbal expression connected to, or contained within, Waste Management's videotape of Fisher. Rather, the viewer of the videotape must infer certain information from the non-verbal conduct presented on the videotape. For example, an interpretation of an actor's condition as "healthy" is based on observed conduct that requires the viewer to make an assessment from the actor's observable physical condition. This assessment is intuitively one step removed from the actor verbally stating that he is, in fact, "healthy." Arguably, had Waste Management recorded Fisher's auditory statements on the surveillance videotape, those auditory expressions would constitute "statements" by Fisher. A non-auditory visual recording of Fisher's physical conduct, however, is simply not a statement according to the majority's own definition.

Further supporting this contention is the notion that conduct recorded without an actor's knowledge is non-affirmative—without an intent to communicate. While the court states that neither Section 287.215 nor the dictionary definition is "so limited"[138] as to exclude statements made "without the claimant's knowledge,"[139] the court cites no authority for this proposition.[140]

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135. *See Fisher*, 58 S.W.3d at 526.
136. *Id.*; *see also supra* note 92 and accompanying text.
137. *See* MO. REV. STAT. § 287.215 (2000).
138. *Fisher*, 58 S.W.3d at 526.
139. *Id.* at 527.
140. *Id.*

One cannot, however, "unwillingly or unwittingly"[141] engage in the affirmative "[a]ct of stating" any more than one can unintentionally do anything with the purpose of doing so.[142] The plain and ordinary meaning of "statement," as enacted by the Missouri legislature, therefore, simply does not support the majority's conclusion that a non-auditory surveillance videotape depicting Fisher's physical conduct is an affirmative statement within the meaning of Section 287.215.

The statutory language of Section 287.215 is not ambiguous, however, and provides a plain meaning upon which the court chose not to rely. While it may be desirable to employ a consistent meaning of "statement" throughout Chapter 287, such a task is for the legislature. The court must, therefore, *apply* an unambiguous statute, not construct a new one.[143]

B. The Policy of Section 287.215

As stated by the majority, the discovery mechanisms of the workers' compensation law are designed to provide "expeditious and simple means of compensation for injuries suffered in the course of employment."[144] These

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141. *Id.* at 526.

142. *Id.*; *see supra* note 92 and accompanying text.

143. *See, e.g.*, Opponents of Prison Site, Inc. v. Carnahan, 994 S.W.2d 573, 578-79 (Mo. Ct. App. 1999) ("courts are without authority to read into a statute a legislative intent contrary to the intent made evident by the plain language"); Bosworth v. Sewell, 918 S.W.2d 773, 777 (Mo. 1996) ("where there is not ambiguity, [the court] cannot look to any other rule of construction"); Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 401 (Mo. 1986) ("where the language is clear and unambiguous, there is no room for construction"); Bishop v. United Mo. Bank of Carthage, 647 S.W.2d 625, 629 (Mo. Ct. App. 1983) ("unambiguous statute should be taken to mean what it says, for the General Assembly is presumed to have intended what the law states directly, and courts have no leave to impose another meaning"); Mo. Div. of Employment Sec. v. Labor and Indus. Relations Comm'n, 637 S.W.2d 315, 318 (Mo. Ct. App. 1982) (the "legislature is presumed to have intended exactly what it states and if the language used in the statute is clear and unambiguous, there is no room for construction"); State *ex rel.* Igoe v. Bradford, 611 S.W.2d 343, 349 (Mo. Ct. App. 1980) ("if the provisions of a statute are express and unambiguous, the court is not at liberty to construe the language in accordance with the intentions of supporters or opponents of the legislation because the court functions to enforce the law as it is written"); Chapman v. Sanders, 528 S.W.2d 462, 465 (Mo. Ct. App. 1975) ("when the language of a statute is unambiguous and conveys plain and definite meaning, 'courts have no business foraging among such rules to look for or impose another meaning'").

144. *Fisher*, 58 S.W.3d at 527 (citing Saint Lawrence v. Trans World Airlines, Inc., 8 S.W.3d 143, 149 (Mo. Ct. App. 1999)).

discovery procedures are also intended to "avoid surprises."[145] The court's ruling in *Fisher*, however, may produce the opposite result. Following *Fisher*, an employer is required to disclose all non-auditory surveillance videotapes of an employee upon a request for statements under either discovery section of the workers' compensation statute.[146] This requirement may effectively reduce the incentive, and create a disadvantage, for employers to obtain such information through surveillance. As a result, an employer may no longer be able to impeach the testimony of an employee, or corroborate its own testimony. Therefore, employers may decide to stop taking surveillance video of employees who file a compensation claim. This could, in effect, retard the workers' compensation process by impeding the employer's ability to collect information, obtain a fair decision, and distribute compensation.

Moreover, non-disclosure of a surveillance videotape upon request for all statements would hardly impede an injured employee from obtaining expeditious relief. As in the instant case, an employer is only likely to refuse disclosure of surveillance videotapes upon request where the employee's testimony or compensation filing was inconsistent with, or contrary to, the surveillance videotape evidence. The employer would then use this evidence during the compensation hearing to impeach the employee's fraudulent filing. Absent such a contradiction, surveillance evidence may serve little purpose. Non-disclosure in this instance would not impede an employee's need for economic relief, because the need—compensation for the alleged but non-existent injury—does not exist. Consequently, an employee denied relief based on such an inconsistency does not require economic relief, for there is no injury, or the injury is not as severe as the employee claims. Arguably, an employer may withhold damaging surveillance evidence that corroborates the disastrous effect of an accident. This argument is unpersuasive, however, because this evidence would merely be superfluous in light of medical records and the apparent physical condition of the employee.

Furthermore, without surveillance videotape evidence, the incidence of fraudulent compensation claims could increase. The number of spurious filings may rise given that the employer would be without important evidence needed to refute those claims, or the extent of the injury. The facts of the instant case support this contention. Relying on Waste Management's surveillance videotape, the Commission significantly reduced the ALJ's injury finding.[147]

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145. *Id.*; *cf.* Wilkerson v. Prelutsky, 943 S.W.2d 643, 649 (Mo. 1997) ("The purpose of discovery is not merely to prevent surprise at trial. An equally important purpose is to narrow the issues and thereby facilitate a speedy and less expensive disposition of the case.").

146. *See supra* notes 82-110 and accompanying text.

147. *See supra* note 31 and accompanying text.

Absent that evidence, the ALJ and Commission must place more reliance on conflicting medical evidence, creating more subjective findings.[148] Arguably, employers may not cease taking surveillance of an employee who has filed a compensation claim. After all, under the new definition of "statement," the employer would merely have to provide the videotape to the employee upon a request for any statements prior to the compensation hearing.[149] Even in this scenario, however, while the employee may then discover that the employer is aware of the fraudulent claim, such a result does not further the court's goal of providing a simple and expeditious means of compensation for an injured employee. This is because compensation is determined at the hearing—the first place during which the surveillance videotape may influence the ALJ's decision. Consequently, pre-hearing disclosure of a surveillance videotape will have no effect on the compensation that is determined at the compensation hearing.

In addition, mandating that employers disclose non-auditory surveillance videotapes under Section 287.215 may not prevent surprise as desired by the majority. Prevention of surprise was easily achieved with a request to produce all statements under Section 287.560 pursuant to a subpoena duces tecum during the deposition of the employer.[150] In other words, had Fisher desired disclosure of the surveillance videotape, a procedure was readily available by which the videotape was discoverable. There is nothing to suggest that a party seeking to discover whether the employer has obtained surveillance videotape was previously incapable of so doing or that he will necessarily take the proper steps to do so now.

Furthermore, the only surprise an employee would encounter when confronted with surveillance evidence is its very existence. This situation may occur where the employee is unaware that surveillance videotapes exist. All of the information conveyed through surveillance regarding the condition of the employee, however, is presumably already known to that employee since one certainly knows one's own physical condition. Discovery of a surveillance videotape, therefore, would merely disclose what the employee already knew, and evidence of which the employer is aware. Such a result prevents surprise to no one. While such illumination may induce a pre-hearing settlement, this alone does not support the majority's liberal construction.

VI. CONCLUSION

As the Court of Appeals for the Eastern District of Missouri noted, "[t]here is no authority for [the] proposition that a videotape with no audio portion

148. *See supra* note 21.

149. *See supra* notes 45-48 and accompanying text.

150. *See supra* notes 72-76 and accompanying text.

constitutes a statement under Section 287.215."[151] Indeed, the *Fisher* court agreed, citing an ancient Chinese proverb that pictures "are worth more than 10,000 words."[152] In the words of the majority, "[t]he request for 'statements' under section 287.215 is simple and straightforward."[153] Equally as simple and straightforward was the plain meaning of a statement under Missouri's two workers' compensation discovery mechanisms. A request for statements pursuant to a subpoena duces tecum includes a request for surveillance videotapes; a request under Section 287.215 did not.

The Missouri Supreme Court's reasoning in *Fisher* might nonetheless be reconciled. Essentially, the court simplified the workers' compensation discovery process. Indeed, the court began its opinion by expressing a desire to harmonize the scope of the two discovery mechanisms for economic and practical reasons.[154] While stating that the "[c]onsideration of pragmatism, consistency and convenience do not wholly govern [its] decision,"[155] these factors ultimately appeared to persuade the court. While such a result seems reasonable, the price is the detriment of statutory preeminence.

As a result of *Fisher*, an employer must now produce any videotaped surveillance of an employee upon request under either Section 287.215 or 287.560. The employer's failure to do so will result in the surveillance videotape being inadmissable at any hearing.

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151. Erbschloe v. Gen. Motors, 823 S.W.2d 117, 119 (Mo. Ct. App. 1992).

152. Fisher v. Waste Mgmt. of Mo., 58 S.W.3d 523, 527 (Mo. 2001) (citing State *ex rel.* Mo. Pac. R.R. v. Koehr, 853 S.W.2d 925, 925 (Mo. 1993)). It should also be noted that the only authority from which the *Koehr* court cites is from a case with Rule 56.01 at issue regarding Section 287.560, not Section 287.215. *See id.*

153. *Id.*

154. *Id.* Specifically, the court noted that, "a request for a statement under section 287.215 is far easier and less expensive than using the deposition and *subpoena* procedure of section 287.590." *Id.*

155. *Id.*